Supreme Court, U.S.
FILED
OCT 10 1995
OFFICE OF THE CLERK

NO. 95-640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JACK F. GRIMM and
JOANNE LAMPE CHARLTON,
Petitioners,

v.

COLUMBUS-AMERICA DISCOVERY GROUP, INC.
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

John H. Reilly, Esq.
DICKERSON & REILLY
780 Third Avenue-29th Floor
New York, NY 10017
(212) 943-7000
Counsel for Petitioners Jack F. Grimm and Joanne Lampe Charlton

Brief Printing Specialists, Inc., 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

34 PP

QUESTIONS PRESENTED

I. Whether a salvor who seeks an award for providing information which contributes to the ultimate safety of property must establish a proprietary interest in the data provided, as to which courts of appeal are in conflict.

II. Should this Court's power of supervision be exercised to correct error caused by the court of appeals sanctioning a departure from accepted and usual course of discovery proceedings by the district court?

LIST OF PARTIES

The parties to the proceeding below were the petitioners, Jack F. Grimm and Joanne Lampe Charlton, Personal Representative of the Estate of Harry G. John and the petitioners, Atlantic Mutual Insurance Company, Salvage Association, London Assurance, Alliance Assurance Company, Ltd., Royal Exchange Assurance, Indemnity Marine Assurance Company, Ltd., Marine Insurance Company, Ltd. and the Superintendent of Insurance of the State of New York (collectively referred to as the "Underwriters") and the respondent, Columbus-America Discovery Group,

Inc. ("CADG").

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES. ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 4

STATEMENT OF THE CASE . . . 4

A. Columbus-America's Sonar Survey 8

B. Proceedings Below 11

REASONS FOR GRANTING THE PETITION 14

I. THE DETERMINATION OF THE COURT OF APPEALS THAT A SALVOR WHO CLAIMS AN AWARD FOR PROVIDING INFORMATION WHICH CONTRIBUTES TO THE EVENTUAL PRESERVATION OF CARGO MUST ESTABLISH THAT HE HAD A PROPRIETARY INTEREST IN THE INFORMATION CONFLICTS WITH SOUTH

AMERICAN S.S. CO. V. ATLANTIC TOWING CO., 22 F.2d 16, 17 (5 Cir.1927) 14

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS 18

III. THE COURT OF APPEALS SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS 19

IV. THE QUESTIONS PRESENTED ARE IMPORTANT 25

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

The Blackwall, 77 U.S. (10 Wall.) 1, 11-12 (1870) 17

Centurian Industries, Inc. v. Warren Steuer, Etc., 665 F.2d 323, 325 (1981) 22

Hener v. U.S., 525 F.Supp. 350 (S.D.N.Y. 1981) 26

South American S.S. Co. v. Atlantic Towing Co., 22 F.2d 16,17 (5th Cir.1927) 14,15,16

TREATISES

Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty (2d ed. 1975) 15, 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,

Petitioners,

v.

COLUMBUS-AMERICA DISCOVERY GROUP, INC.

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Jack F. Grimm and Joanne Lampe Charlton, Personal Representative

of the Estate of Harry G. John, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated June 14, 1995, is reported as Columbus-America Discovery Group v. Atlantic Mutual Insurance Co., 56 F.3d 556 (4th Cir. 1995) (hereinafter "CADG II"), and is reproduced at page 1a of the Appendix to this Petition ("Pet.App."). The opinion of the United States District Court for the Eastern District of Virginia dated November 18, 1993, is unreported and is reproduced at Pet.App.74a. The Order entered January 13, 1994 approving the Marketing Plan is not published and is reproduced at Pet.App.203a. The Order of the United States Court of Appeals for the Fourth Circuit denying rehearing and denying rehearing in banc, dated July 11, 1995, is not published and is reproduced at Pet.App.402a.

The first opinion of the United States Court of Appeals for the Fourth Circuit dated August 26, 1992, is reported as Columbus-America Discovery Group v. Atlantic Mutual Insurance Co., 974 F.2d 450 (4th Cir. 1992), cert.denied, 123 L.Ed.2d 183, 113 S.Ct.1625 (1993) (hereinafter "CADG I") and is reproduced at Pet.App.217a. The order of the Supreme Court of the United States of America denying the respondent's Petition for Writ of Certiorari dated March 22, 1993 is not published and is reproduced at Pet.App.399a.

The first opinion of the United States District Court for the Eastern District of Virginia dated August 14, 1990, is reported as Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Sailing Vessel, 742 F.Supp. 1327 (E.D. Va. 1990) rev'd, in part, remanded, sub nom. Columbus-America Discovery Group v. Atlantic Mutual Ins. Co. et al., 974 F.2d 450 (4th Cir. 1992), cert.denied, 123 L.Ed.2d 183, 113 S.Ct. 1625 (1993) and is reproduced at Pet.App.322a. The Order of the United States Court of Appeals for the Fourth Circuit denying the

Motion for Clarification dated April 4, 1994 is not published and is reproduced at Pet.App.398a. The Order of the United States Court of Appeals for the Fourth Circuit denying rehearing and denying rehearing in banc, dated October 15, 1992 is not published and is reproduced at Pet.App.404a.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C., § 1254(1).

STATEMENT OF THE CASE

Petitioners, Harry G. John and Jack F. Grimm intervened in this salvage action alleging that Columbus-America Discovery Group ("Columbus-America") in its search for the CENTRAL AMERICA used information obtained from Columbia University which the University gathered during a sonar survey which it conducted for Santa Fe Communications, Inc. ("Santa Fe") in February-March, 1984. In 1986 Columbia University sent materials gathered during that survey to Columbus-America upon the false

representation of Thomas G. Thompson that they were to be for his sole use and would not be reproduced for others.

Harry G. John was one of a number of individuals and groups who discussed and planned the salvage of the CENTRAL AMERICA. John used his company, Santa Fe, in his treasure hunting efforts. By reason of a contract which Grimm made with the University in 1980 he had the right to use Columbia University's side scan sonar for a period of five years. Grimm and John pooled their resources and agreed to work together to locate the CENTRAL AMERICA.

Santa Fe paid Columbia University Three Hundred Thousand ($300,000.00) Dollars for the University's Lamont-Doherty Geological Observatory to conduct a sonar search over a 400 square mile area of the Atlantic Ocean. The expedition was directed by Dr. William Ryan. During his sonar search, Dr. Ryan identified seven "targets" on the ocean floor. Of these targets, he found only one, target #4, to be a good candidate for being the CENTRAL AMERICA. Dr.

Ryan felt that this target was almost certainly the scattered debris of a shipwreck, and his report mentioned that further exploration of it would have been made but for gale force winds and seas. He told Harry John and Jack Grimm that they had had a likely candidate for further exploration, and recommended that they use a submersible to determine if it was the CENTRAL AMERICA.

Between the spring of 1984 and the summer of 1987 a manned submersible was not available for work in the Blake Plateau Region.

In December, 1984 a majority of the Board of Directors of Santa Fe decided not to advance further funds in search of treasure and over the objection of Harry John assigned all of its interests in undersea salvage operations to the Province of St. Joseph of the Capuchin Order.

The Santa Fe survey was performed from the deck of the University's research vessel ROBERT CONRAD. Upon completion of the survey the CONRAD headed for Bermuda. Within one day after the CONRAD's arrival in Bermuda,

Thompson began his efforts to learn the findings of the survey.

Mr. Ryan had his first telephone call from Thomas Thompson in 1984. Thompson introduced himself as an employee of the Battelle Laboratories and told Ryan that Battelle did commercial work of a proprietary nature for commercial clients, classified work for the military and basic research. Thompson told Ryan he was interested in sonar, particularly in the SeaMARC sonar system, how it was used, what results you get and how the user analyzed the data to recognize and define anomalies, or targets, on the ocean floor. Between 1984 and 1986, Thompson and Ryan had numerous conversations concerning various sonar searches that Lamont-Doherty had conducted using the SeaMARC I, culminating in Thompson's February 12, 1986 request for copies of the sonar record and contour map data from the 1984 CONRAD survey.

Ryan passed on Thompson's request to his division administrator, who on March 19, 1986 wrote a letter to Thompson at

Battelle granting the request on the condition that the data would be for Thompson's sole use and not reproduced for others, because "the data ... is not in the public domain." The letter also stated that Columbia would not relinquish its exclusive right to publish the data until its graduate students who were working with the data had published their dissertations. Ryan believed that Thompson was interested in this information from a scientific standpoint.

Thompson agreed to Columbia's terms and received the data which, in addition to the sonar photographs and a contour chart, included the CONRAD's ship track lines, indicating the vessel's path within the survey boundaries.

A. Columbus-America's Sonar Survey

Columbus-America conducted a sonar survey in June-July 1986 in an effort to locate the CENTRAL AMERICA. In preparing for this survey it made an historical study of the sinking of the vessel and a study of the area winds and currents and their effect on drifting objects.

The information developed in the foregoing studies led to the creation of a Probability Map covering about 2400 square miles of the ocean which they divided into two mile square cells. Each cell was given a number indicating the probability that the wreck was in that cell multiplied by 1000. A Search Plan which covered over 1000 square miles of ocean was then carved out of the Probability Map. The Search Plan was designed to include each of the two mile square cells which had been assigned a probability of one in one thousand or more.

The data which Thomas Thompson obtained from William Ryan was on board the Columbus-America's vessel during their 1986 survey.

A sonar image of the CENTRAL AMERICA was obtained during the 1986 survey, but it was not obtained within the boundaries of the Search Plan. If Columbus-America had not gone beyond the western boundary of the Search Plan their vessel would have returned to port without having obtained a sonar image of the CENTRAL AMERICA.

At the time the CONRAD materials were sent to Thompson by Columbia University he was working with Messrs. Evans, Williamson, Newton and others looking for the CENTRAL AMERICA. Thompson violated Columbia's conditions for letting him have the CONRAD data by sharing the information which he obtained from the University with Robert Evans, the Vice President and Project Director of Columbus-America, and with his sonar specialist Michael Williamson.

Thompson showed Evans the CONRAD materials shortly after they were received from the University. Evans and Thompson examined the photographs of the sonar imagery recorded during the CONRAD survey together and discussed targets shown in the photographs. After he discussed the materials with Thompson, Mr. Evans examined them alone. Evans unfolded the maps and looked at the photographs in general. Evans found the bathymetric map to be very detailed; he had never before seen a bathymetric map of that area which was so detailed. He examined sonar targets shown on the photographs and he was able to

determine the complexity of the geology from the photos.

Thompson showed Michael Williamson the CONRAD data during the Columbus-America 1986 survey. Thompson and Williamson looked at the records together and saw the sonar imagery on a few of the photographs.

B. Proceedings Below

1990 Trial

At the conclusion of the 1990 trial the district court, Richard B. Kellam, Senior District Judge, found that there was no evidence to support the salvage claim of John and Grimm. On appeal the Fourth Circuit held that the court had abused its discretion by refusing John, Grimm and Columbia University an opportunity for discovery prior to trial. The court of appeals remanded the case to the district court to apply the law of salvage stating that should it be found that Columbus-America used the intervenors' information and such use contributed to the discovery of the CENTRAL AMERICA, a salvage award could be proper.

1993 Trial

At the conclusion of the 1993 trial the district court, Richard B. Kellam, Senior District Judge, held the proof of Grimm and John insufficient to establish that Columbus-America had availed itself of any of the data gathered during the CONRAD expedition. Pet.App.-167a.

1995 Appeal

The court of appeals recognized that Thompson violated the conditions imposed by Columbia University when it sent Thompson the CONRAD data, in that Thompson placed the materials in the Columbus-America file which was taken on their 1986 survey and that he shared the data with Williamson, his sonar expert, and Evans, his project director. Pet.App.26a.

Despite the violation of the University's conditions, the district court accepted the testimony of these three witnesses, each of whom are to share in the profits of the venture, that they made no use of the data. The appellate court did not disturb

this fact finding.

The court of appeals also recognized that Thompson's sonar image of the CENTRAL AMERICA was recorded in a zero cell, one with an assigned probability of less than one in one thousand, which was located very close to the southwest extreme of the Probability Map. The court of appeals did not refer to the fact that the cell in which the sonar image was recorded was located beyond the boundary of their Search Plan. The Search Plan was approximately one-half the size of the Probability Map.

The court of appeals held that Grimm and John had to demonstrate that they had a proprietary interest in the CONRAD data and that Columbus-America without authority used the data in a manner inconsistent with their proprietary interest.

No authority was offered to support the requirement that a salvor who claims an award for providing information must demonstrate that he had a proprietary interest.

REASONS FOR GRANTING THE PETITION

1. The opinion of the court of appeals that the intervenors' lack of a proprietary interest in the CONRAD data provides an independent ground for its affirmance of the district court's judgment conflicts with South American S.S. Co. v. Atlantic Towing Co., 22 F.2d 16, 17 (5th Cir.1927).

2. The case presents an important problem under the Federal Rules of Civil Procedure as to the extent of the discretion of the district court in ruling upon claims of privilege when a party withholds information otherwise discoverable.

I. THE DETERMINATION OF THE COURT OF APPEALS THAT A SALVOR WHO CLAIMS AN AWARD FOR PROVIDING INFORMATION WHICH CONTRIBUTES TO THE EVENTUAL PRESERVATION OF CARGO MUST ESTABLISH THAT HE HAD A PROPRIETARY INTEREST IN THE INFORMATION CONFLICTS WITH SOUTH AMERICAN S.S.

CO. V. ATLANTIC TOWING CO., 22 F.2d 16, 17 (5TH Cir.1927).

Harry John and Jack Grimm based their claim for salvage upon the fact that their efforts led to the creation of the CONRAD survey and the information developed in the CONRAD survey assisted Columbus-America in finding the CENTRAL AMERICA.

Admiralty law recognizes that the giving of advice or information leading to the preservation of property in peril qualifies for a salvage award. So long as a ship or her cargo is in peril, any voluntary act which contributes to the ultimate safety of the property may rank as an act of salvage. As stated in Gilmore and Black, The Law of Admiralty, 2nd ed.1975 at page 536, it would be fruitless to list the almost infinite range of acts which have been held to constitute salvage. Examples they do cite involve giving information on the channel to follow to escape from an ice flow (The Tower Bridge [1936] P. 30), and giving information to avoid running aground (South American S.S. Co. v.

Atlantic Towing Co., 22 F.2d 16 (5th Cir.1927).

It cannot be said that either of the salvors in the foregoing cases had a proprietary interest in the information they provided.

In South American S.S. Co. v. Atlantic Towing Co., (supra) the claimant was given a salvage award based upon his having told another vessel's crew that they were proceeding into shallow water and that they should change course. The vessel altered its course and avoided the danger of grounding.

It is also to be noted that Columbia University did not base its claim for salvage for having performed the CONRAD survey.

In its memorandum of law submitted in opposition to Columbus-America's motion for summary judgment, Columbia University stated:

> Columbia's claim to a salvage award is based on the fact that it provided the 1984 survey data to

Columbus-America and that Columbus-America used the data to help it locate the CENTRAL AMERICA.

Columbia University had no grounds upon which to base a claim for performing the survey. It received $300,000.00 for that work. The salvor's act must be voluntary - that is, he must be under no official or legal duty to render the assistance. Gilmore & Black at page 535.

Even if Columbia University was entitled to a salvage award on proof that Columbus-America used the CONRAD survey, that does not foreclose Grimm and John's claim for salvage. Useful services of any kind rendered to cargo in peril may entitle those who render such services to a salvage award. More than one set of salvors may contribute to the saving of the property, and in such cases all who engaged in the enterprise and materially contributed to the saving of the property, are entitled to share in the reward. The Blackwall, 77 U.S. (10 Wall.) 1, 11-12 (1870).

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

One of the clearly erroneous findings of the district court was that Ryan's target #4 was not the CENTRAL AMERICA.

The court of appeals wrote: Actually the district court found that CONRAD TARGET #4, despite its apparent similarity in size and admitted proximity to the proven location of the CENTRAL AMERICA, was not in fact the shipwreck. Because we affirm the court's denial of the intervenors' claim on sufficient alternative grounds, we need not review this particular finding. Pet.App.37a.

The district court's finding that target #4 was not the CENTRAL AMERICA was patently wrong.

The difference between the coordinates given to Mr. John by Dr. Ryan and the coordinates given to the court by Columbus-America arises from navigational computation, not from any difference in actual location. The sonar photographs in evidence which include an image of the CENTRAL

AMERICA reveal no other targets within the short distance between the two sets of coordinates (Exhibits A-637, A-627-2 and D-451).

While the court of appeals agreed with John and Grimm's argument that the CONRAD data was not in the public domain (Pet.App.33a), the court of appeals did not review several crucial findings which, if recognized as clearly erroneous would compel the conclusion that the ultimate finding that Columbus-America did not make use of the CONRAD data was clearly erroneous; e.g., Finding: Williamson who was the Columbus-America sonar expert said that in his opinion the CONRAD data was of little value. FACT: Williamson testified that he was able to determine the latitude, longitude and size of target #4 from the sonar photograph and the target was worthy of investigation for the possibility of it being the CENTRAL AMERICA.

III. THE COURT OF APPEALS SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The difficult job of establishing fraudulent behavior in planning and conducting the sonar search, and the activities of Columbus-America at sea in 1987, was made more difficult by the district court's failure to direct the production of navigational records which we were told existed at the 1990 trial, diving or camera logs, pictures and videos, apart from what they selected from their library to show us, and recovery records of artifacts. Charts reflecting actual track lines run in 1986 and 1987 were not produced until the trial.

Columbus-America was not directed to give us the position of the Central America until the second day of the trial.

Virtually all of the ships' logs were heavily redacted.

Efforts of Grimm and John to obtain production of documents began with a motion for a Discovery Conference pursuant to Rule 26(f) Fed. R. Civ. P. heard in January 1993. The district court did not believe a discovery conference was necessary. John and Grimm demanded

the production of documents identified in their discovery plan. The district court conducted a hearing on April 27, 1993 and considered a letter, dated April 21, requesting his assistance in directing Columbus-America to produce a list of 19 documents and the original copies of redacted materials that had been produced.

At the April 27 hearing the court advised counsel that he was not going to review the many documents which were redacted by Columbus-America to determine whether they were discoverable and that the court had to rely upon what the lawyer said as the basis for the redaction.

At the close of the April 27 hearing counsel agreed to confer in an effort to refine the request for production. After conferring with counsel a motion, dated May 12 with supporting affidavit, was brought on for a hearing on June 7, 1993 when the Court stated that discovery is the greatest waste of time that's ever been created, and ruled that it was not going to require any more production, except what has been stated will be

produced.

Columbus-America told the Court that their documents were redacted because the redacted information was confidential laboring under the misconception that the other parties must offer evidence that its redactions are improper before it may be compelled to produce unredacted documents.

There is no absolute privilege for trade secrets and similar confidential information. To resist discovery a person must first establish that the information is a trade secret and then demonstrate that its disclosure might be harmful Centurian Industries, Inc. v. Warren Steuer, Etc., 665 F.2d 323, 325 (1981).

Columbus-America at three different times alleged in its pleadings that it located the CENTRAL AMERICA in three different places. In 1987 it obtained a permanent injunction to salvage a wreck 32 miles east of where the CENTRAL AMERICA sank. When it obtained that injunction its files included sonar images of the

CENTRAL AMERICA which were obtained in its 1986 survey. It also had in its files a sonar image of the CENTRAL AMERICA which was obtained during the CONRAD survey.

Ryan's target #4 was labeled their target "F". Williamson in 1986 made various measurements of the sonar imagery obtained in their 1986 survey, and it was only target "F" which measured to be about 300 feet.

Although Columbus-America spent the entire summer of 1987 at sea and, in addition to working at its injunction site, visited the sites of other targets observed in the 1986 survey, it denied making any effort to verify whether or not target "F" was the CENTRAL AMERICA until it went back to sea in late summer of 1988, when it headed directly to target "F".

The unredacted logs may well have included evidence to the contrary.

The district court also denied our request to inquire into the terms of the settlement agreement between Columbia University and

Columbus-America which was announced on the eve of trial. Our request that the court view the agreement was also denied.

Grimm and John made an offer of proof that the settlement provided for agreement on the part of Columbia to prevent the giving of testimony by Dr. Ryan at trial and he feared he would be terminated by the University if he appeared as a witness.

It was alleged that the terms of the settlement agreement between Columbus-America and Columbia provided that if any Columbia employees testified, the University was to be penalized.

Dr. Ryan did not appear as a witness and Grimm and John had no expert witness to testify at the trial.

In 1990, Professor Ryan was shown a letter of Charles Herndorf, Science Coordinator of the SS CENTRAL AMERICA Project, to Barbara Hecker, dated November 25, 1989 in which Dr. Herndorf thanked Dr. Hecker, a biologist at Columbia University, for her willingness to

look at some photographs from the wreck site of the SS CENTRAL AMERICA "[which] lies about 200 km off Charleston S.C. in nearly 2300 m of water (32 N, 77W)." Photographs were enclosed with the letter. Some of the photographs showed gold. They were taken at a depth of 2300 meters. The 2300 meter isobath is far from the first injunction box. Ryan reported this to the financial administrator of Lamont-Doherty who suggested Ryan call counsel. An investigation was conducted which revealed that Columbus America had moved their salvage operation to the area of Ryan's targets #3 and #4. Grimm, John and Columbia University filed their motions to intervene.

Were it not for the Herndorf letter, it is unlikely Grimm and John would ever have learned of Thompson's thimblerig.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT.

The recent development of equipment permitting recovery from the sea floor of objects thought to have been lost forever has brought with it disputes as to ownership

and salvor's rights.

This decision questions admiralty principles which have been recognized for centuries.

The salvage claim of John and Grimm has been confused with copyright and trade secret concepts.

The same reasoning offered by Judge Sofaer in Hener v. U.S., 525 F.Supp.350 (S.D.N.Y.1981) for admiralty disfavoring the law of finds may be applied to the law of unfair competition.

The aim of salvage law is the preservation of property and encourages less competitive and secret conduct than the law of unfair competition.

Review by this Court is required to resolve the conflict between the 4th and 5th Circuits and provide guidance to the cases which are to follow.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John H. Reilly
DICKERSON & REILLY
780 Third Avenue
New York, NY 10017
(212) 943-7000
Counsel for Petitioners
Jack F. Grimm and Joanne
Lampe Charlton, Personal
Representative of the
Estate of Harry G. John